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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JAMES GILBERT,

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

and

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO,

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO, CFL, IN OPPOSITION TO WRIT

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37 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 4

ARGUMENTS IN OPPOSITION TO GRANTING WRIT 6

I. This Case Fails to Present The Question Reserved in *NLRB v. General Motors* 6

A. The Legal Framework 6

B. The Question Reserved In *General Motors* Concerning the Scope of Union-Security Clauses Is Not Presented Here 11

II. The Disposition Here Does Not Overrule Prior Board Decisions and Is Mandated by This Court's Ruling In *Beck* . 13

A. The *McGraw Edison* Line Analyzed 14

B. The *McGraw Edison* Line Is Inapplicable, Particularly In Light Of *Beck* 17

III. This Decision Creates No Inter-Circuit Split 22

IV. The Board Correctly Found Gilbert Exercised No Protected § 7 Rights, and

The Issue Fails to Present An Important Question 27

V. Conclusion 30

TABLE OF AUTHORITIES

Cases: **Page(s)**

Allis-Chalmers Mfg. Co.,
388 U.S. 175 (1967) 7, 28

Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837 (1984) . . 10

Communications Workers Local 9509 (Pacific Tel. & Tel. Co.), 193 NLRB 83 (1971) 16

Communications Workers v. Beck, 487 U.S. 735 (1988) 4, 5, 9, 13, 15, 17-21, 23, 24

Helton v. NLRB, 656 F.2d 883 (D.C. Cir. 1981) 28

Hendricks Cty. Rural Elec., Etc. v. NLRB, 603 F.2d 25 (7th Cir. 1979) . . . 29

Inland Boatman's Union of the Pacific (Dillingham Tug & Barge Co.), 276 NLRB 1261 (1985) 16

Intern. Ass'n of Bridge v. NLRB, 792 F.2d 241 (D.C. Cir. 1986) . . 14

Laborers Local 806, 295 NLRB 941 (1989) 29

Local 1104, Comm'n Wkrs. of America, AFL-CIO v. NLRB, 520 F.2d 411 (2d. Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976) 5, 16, 22-24

Machinists District 94 (McDonnell Douglas),
283 NLRB 881 (1987) 17

Meat Cutters (S & M Grocers),
237 NLRB 1159 (1978) 28

Molders Local 125 (Blackhawk Tanning Co.),
178 NLRB 208 (1969), *enforced* 442 F.2d
92 (7th Cir. 1971) 8

NLRB v. City Disposal Systems, Inc.,
465 U.S. 822 (1984) 27

NLRB v. Erie Resistor Co.,
373 U.S. 221 (1963) 27

NLRB v. General Motors Corp.,
373 U.S. 734 (1963) . . 4, 9, 11-13

NLRB v. Marine & Shipbuilding Workers,
391 U.S. 418 (1968) 8

NLRB v. Metropolitan Life Ins. Co.,
380 U.S. 438 (1965) 14

NLRB v. Pipefitters Union Local No. 120,
719 F.2d 178 (6th Cir. 1983) 22, 26

NLRB v. Pittsburg Steamship Co.,
340 U.S. 498 (1951) 6

Oil Workers v. Mobil Oil Corp.,
426 U.S. 407 (1976) 8, 9, 19

Oil, Chemical & Atomic Workers Intern.
v. NLRB, 806 F.2d 269 (D.C. Cir. 1986) 4

Pattern Makers' League v. NLRB,
473 U.S. 95 (1985) 7, 9, 10, 26, 27

Reef Industries, Inc. v. NLRB,
952 F.2d 830 (5th Cir. 1991) . . 30

Roadmaster Corp. v. NLRB,
874 F.2d 448 (7th Cir. 1989) . . 30

Roadway Express, Inc.,
108 NLRB 874 (1954), *enforced sub nom. Teamsters Local 823 v. NLRB*, 227 F.2d 439 (10th Cir. 1955) 29

Scofield v. NLRB,
394 U.S. 423 (1969) . . . 7, 25, 28

Sheet Metal Workers Local 22 (Miller Sheet Metal), 296 NLRB 1146 (1989) 28

Steelworkers Local 4186 (McGraw Edison Co.),181 NLRB 992 (1970) 15-17, 20, 21, 23

Sure-Tan, Inc. v. NLRB,
467 U.S. 883 (1984) 10

Telephone Traffic Union (New York Tel. Co.),
241 NLRB 826 (1979) 16

United States v. Williams,
504 U.S. 36 (1992) 6, 21

Vaca v. Sipes, 386 U.S. 171 (1967) . . 22

Wirtz v. Local 153, G.B.B.A.,
389 U.S. 463 (1968) 25

Wooddell v. Electrical Workers,
502 U.S. 93 (1991) 22

Statutes: **Page(s)**

28 U.S.C. § 1254 1

29 U.S.C. § 157 6

29 U.S.C. § 158 . . . . . 7, 8

29 U.S.C. § 401 22

42 U.S.C. § 2000 12

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JAMES GILBERT,
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V.

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INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO,
Respondents

STATEMENT OF THE CASE[1]

At all material times, Petitioner James Gilbert was an employee of Kaiser Cement Corporation and a member of Respondent International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers. In September 1988, Gilbert

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[1]Respondent agrees that Petitioner has timely filed his writ with this Court. This Court properly has jurisdiction to consider the writ, as provided in 28 U.S.C. § 1254(1).

presented a company proposal to members of Boilermakers Local D-100 that would have converted 17 of 37 or 38 bargaining unit jobs to salaried, nonunion positions. Pet. App. 32a-34a. At that time, Gilbert served as president of Local D-100. Pet. App. 29a. Under this proposal, Gilbert's job would have become nonunion. Pet. App. 35a. Gilbert allowed the proposal to be put to a vote, and the members of the bargaining unit rejected it 23 to 11. Id.

Internal union charges were brought against Gilbert for this conduct. Pet. App. 37a.[2] A disciplinary hearing was held on November 19, 1988, and Gilbert was found to have violated the Boilermaker's constitution. Pet. App. 39a.[3] As a sanction for his wrongful conduct, Gilbert was precluded from holding union office for five years and from attending union meetings, except those at which a contract affecting him was to be considered, during that period. Pet. App. 39a-40a.

In April 1989, Gilbert wrote to Boilermaker President C.W. Jones asking whether he had been "suspended" from the

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[2]Three other members were also charged and ultimately disciplined for related activity. They did not file unfair labor practices charges and pursue no claim before this Court.

[3]Gilbert has not and does not now challenge the propriety of the hearing or the provisions of the constitution under which he was disciplined.

union and was, therefore, relieved of the obligation to pay dues. President Jones informed Gilbert that he had not been suspended and was expected to pay dues to remain a member of the Boilermakers. Pet. App. 40a-42a. Gilbert then wrote to President Jones asking "what penalties might be imposed if we discontinued paying dues . . . ." President Jones informed Gilbert that the union would seek to enforce the union-security clause in the labor agreement between the Boilermakers and Kaiser Cement. Pet. App. 43a-44a. Gilbert briefly stopped paying dues, and the union so informed the company. Gilbert then made up the arrearage and started paying dues again. His employment status was not affected. Pet. App. 44a-45a.[4]

In December 1989, the National Labor Relations Board issued a complaint alleging the Boilermakers violated § 8(b)(1)(A) of the National Labor Relations Act by coercing Gilbert in the exercise of rights protected under § 7 of the Act. Pet. App. 27a. Following a trial, an administrative law judge found the union did not violate the Act. Pet. App. 55a. The Board affirmed. Pet. App. 27a. The Court of Appeals for the District of Columbia Circuit denied Gilbert's petition for review of the Board's ruling.

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[4]Gilbert does not challenge the propriety of the union-security agreement in the Boilermaker contract with Kaiser Cement. He has not even presented the language of that clause to this Court.

Pet. App. 18a. Petitioner's writ followed.

SUMMARY OF ARGUMENT

Petitioner Gilbert attempts to induce this Court to grant certiorari on a series of questions addressing the financial obligations of workers to pay union dues pursuant to lawful agency or union shop agreements. Certiorari is inappropriate because Petitioner's questions either are not factually presented in this case or have been foreclosed by controlling decisions of this Court. Ultimately and almost surreptitiously, Petitioner urges on this Court a result that would sanction a class of free riders -- workers who benefit from a union's collective bargaining efforts yet avoid making any monetary contribution toward the cost of securing advantageous terms and conditions of employment -- in contravention of *Communications Workers v. Beck*, 487 U.S. 735, 749-50 (1988). Not only would this result crack the legal foundation upon which *Beck* was built, it would also border on the perverse inasmuch as only those workers disciplined for violations of union rules would qualify for free-rider status.

Petitioner incorrectly contends this case raises a question reserved in *NLRB v. General Motors Corp.*, 373 U.S. 734, 745 n. 12 (1963), concerning the efficacy of labor agreements the terms of which preclude certain workers or groups of workers from attaining union membership. Petitioner here, however, was permitted to join the

union on the same terms and conditions as anyone else. The labor agreement treated all persons evenhandedly.

Petitioner also incorrectly contends the Court of Appeals decision in this case, which effectively refuses to endorse free-rider status for union members disciplined for breaking their organization's rules, conflicts with *Local 1104, Comm'n Wkrs. of America, AFL-CIO v. NLRB*, 520 F.2d 411, 420 (2d. Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976). This is an artificial conflict in that this Court's intervening decision in *Beck* recognizes that free riders of any stripe need not be permitted and, accordingly, undercuts both the premise of and the result in the *Local 1104* opinion, issued some 13 years earlier.

Finally, Petitioner incorrectly contends his conduct was protected under § 7 of the Act, contrary to the findings below. Petitioner cites no authority suggesting promotion of a company proposal to convert bargaining unit jobs to nonunion positions is or should be protected. Whether particular conduct deserves § 7 protection is a fact-based determination entrusted to the Board's expertise, and any reasonably defensible decision should not be disturbed. Even if the discipline imposed on Petitioner were improper, he would not be entitled to stop paying dues and assume free-rider status as some sort of self-help remedy, as *Beck* makes clear.

In short, Petitioner can demonstrate neither a question of overriding public importance nor a genuine conflict among the circuit courts resulting from the extant judicial and administrative determinations in this case. Such questions or conflicts represent the hallmarks of cases deserving of review on certiorari. *NLRB v. Pittsburg Steamship Co.*, 340 U.S. 498, 502 (1951) ("Certiorari is granted only 'in cases involving principles the settlement of which is of importance to the public as distinguished from the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.'" (quoting *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923))). *See also United States v. Williams*, 504 U.S. 36, 44 (1992) (Court may grant certiorari to consider "an important issue expressly decided by a federal court . . . ."). Simply put, there is nothing here to warrant the expenditure of this Court's otherwise precious time, attention and judicial resources.

ARGUMENTS IN OPPOSITION TO GRANTING WRIT

I. This Case Fails to Present The Question Reserved in *NLRB v. General Motors*

A. The Legal Framework

Before turning to the precise questions Petitioner poses, it may be helpful to sketch briefly the contours of the relevant statutory and case law. Section 7 of the National Labor Relations Act, 29 U.S.C. § 157 permits employees to form labor

organizations, bargain collectively and to otherwise engage in concerted activities or to refrain from such activity, except to the extent they may be required to become members of a labor organization as a condition of employment pursuant to an agreement between a union and an employer. Pet. App. at 58a. Nonetheless, a union properly may impose internal discipline on its members for otherwise protected conduct provided a member may resign from the organization and, thus, avoid the sanctions. *Pattern Makers' League v. NLRB*, 473 U.S. 95, 101 (1985); *Scofield v. NLRB*, 394 U.S. 423, 428-30 (1969). In turn, § 8(b)(1), 29 U.S.C. § 158(b)(1), makes it an unfair labor practice for a union to "restrain or coerce . . . employees in the exercise of" their § 7 rights. By its own terms, however, this section "shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . ." *Id.* Therefore, a union may discipline a member for conduct that falls within the ambit of § 7. *See, e.g., Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 196-97 (1967) (union properly disciplined members who refused to honor a strike, even though the refusal may have been protected under § 7).

A union, however, cannot demand that an employer terminate an employee for engaging in protected § 7 conduct. *Scofield*, 394 U.S. at 428. Likewise, a union cannot impose internal discipline at all if it would impair "an overriding policy of the labor laws . .

. ." *Id.*, at 429. The National Labor Relations Board has recognized that a union imposing internal discipline on a member who attempts to avail himself of the Board's processes, as by filing a decertification petition or an unfair labor practice charge, runs afoul of this rule. ***Molders Local 125 (Blackhawk Tanning Co.)***, 178 NLRB 208 (1969), *enforced* 442 F.2d 92 (7th Cir. 1971). *See also* ***NLRB v. Marine & Shipbuilding Workers***, 391 U.S. 418, 424 (1968).

Section 8(a)(3), 29 U.S.C. § 158(a)(3), prohibits an employer from discriminating in the terms and conditions of hiring or employment in a manner that encourages or discourages union membership. This section contains two qualifications. First, a union and an employer may enter into an agreement requiring an employee to become a member of the labor organization as a condition of employment. *Id.* Second, an employer may not discriminate against, e.g. by firing, a non-member employee if the union has declined to make membership available to that employee "on the same terms and conditions generally applicable to other members" or if membership has been denied or terminated for reasons other than nonpayment of dues "uniformly required as a condition of . . . membership." *Id.* Union-employer agreements requiring such membership are typically known as "union" or "agency" shop provisions. *See Oil Workers v.*

Mobil Oil Corp., 426 U.S. 407, 409 n. 1 (1976).[5]

For purposes of § 8(a)(3), "membership" is limited to the payment of dues and fees or, as this Court has said, its "financial core." *General Motors*, 373 U.S. at 742-43. Thus, a § 8(a)(3) or "financial core" union member owes no duties or obligations to the labor organization beyond the payment of dues.[6] In contrast, a "full member" typically agrees to abide by the union's internal rules and regulations and -- unlike the financial core member -- may be disciplined for violating those obligations. *General Motors*, 373 U.S. at 743. As this Court stated in *Pattern Makers' League*, 473 U.S. at 106:

> [U]nion security agreements permitted by § 8(a)(3) require employees to pay dues, but an employee cannot be discharged for failing to abide by union rules or policies with which he disagrees.

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[5]The agency and union shop agreements stand in contrast to the now-prohibited "closed" shop clauses requiring that an employer hire only current union members. *Oil Workers*, 426 U.S. at 409 n. 1.

[6]The financial-core member need only pay that portion of the dues and fees used for collective bargaining and representation purposes. *Beck*, 487 U.S. at 762-63.

> Full union membership thus no longer can be a requirement of employment. If a new employee refuses formally to join a union and subject himself to its discipline, he cannot be fired. Moreover, no employee can be discharged if he initially joins a union, and subsequently resigns.

In turn, § 8(b)(2) prohibits a union from inducing an employer to violate § 8(a)(3).

Finally, the Board has been accorded considerable latitude in interpreting and applying the Act, and the agency's application of the statutory provisions should be treated with deference. *Pattern Makers' League*, 473 U.S. at 114 ("Where the Board's construction of the Act is reasonable, it should not be rejected 'merely because the courts might prefer another view of the statute.'" (quoting *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979))); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984) (The Board's construction of the statutory language is "entitled to considerable deference, and the courts should "uphold any interpretation that is reasonably defensible."). *See also Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 844-45 (1984).

Analyzed against this backdrop, Petitioner's position warrants no substantive consideration in this Court beyond a

determination that further review is unjustified and certiorari should be denied.

B. The Question Reserved In *General Motors* Concerning the Scope of Union-Security Clauses Is Not Presented Here

At the outset, Petitioner suggests this case presents a question expressly reserved in *General Motors*, 373 U.S. at 744-45 n. 12, regarding the scope of permissible union shop agreements. Pet. at 8. This misapprehends both the question left unanswered in *General Motors* and the factual posture of this case, since the two never intersect.

The issue before the Court in *General Motors* was whether an employer commits an unfair labor practice by refusing to negotiate with a union over a proposed agency shop agreement. *Id.* at 734-35. The Court agreed with the Board that the employer's refusal violated the Act. *Id.* at 745. The particular agency shop proposal would have allowed each employee to choose whether or not to become a full member of the union, though everyone would have to pay dues. The Court found this to be consistent with the congressional purpose of "reduc[ing] the evils of compulsory unionism while allowing financial support for the bargaining agent." *Id.* at 744. In n. 12, the Court posed -- but did not answer -- a related question: Whether an agency shop agreement that by its terms barred certain employees from full union membership would comport with § 8(a)(3). That is, could an agency shop agreement, for example, preclude women or

Blacks from full union membership, while exacting dues from them?[7]

There is no issue here about the scope of the union security clause and whether its terms precluded certain employees from attaining full membership. Indeed, Petitioner has not even made the clause part of the record before this Court. Moreover, the union afforded Petitioner full membership. Petitioner concedes as much when he argues that his membership was different than that of others only after and as a result of the union discipline imposed on him. Pet. at 13. The Court of Appeals quickly and correctly disposed of this sophistry: "Membership was offered to Gilbert on the same terms as it was to other employees. This membership, however, included both rights and obligations. When Gilbert freely chose to violate his obligations, he was disciplined just as any other member would have been." Pet. App. at 10a.

In any event, however, the facts of this case simply fail to pose the question reserved in *General Motors*. This plainly is an insubstantial basis for granting certiorari.

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[7]At the time *General Motors* was decided, such discriminatory provisions would have presented very real concerns (as opposed to standing merely as forensic straw men), since the Civil Rights Act of 1964 had not yet been enacted. *See* 42 U.S.C. § 2000e-2(a), (c).

Petitioner apparently attempts to transmute the *General Motors* question into the "important issue" of whether "a requirement that employees financially support a union impairs a fundamental congressional policy" of voluntary unionism. Pet. at 8-9. This Court, of course, has already definitively addressed the issue in *General Motors*, 373 U.S. at 743-44; *Beck*, 487 U.S. at 750; and elsewhere, finding a requirement that employees pay for the core financial costs of union representation to be fully consistent with voluntary unionism.

II. The Disposition Here Does Not Overrule Prior Board Decisions and Is Mandated by This Court's Ruling In *Beck*

Petitioner next suggests this Court should grant certiorari because the Board in this case effectively overruled the so-called *McGraw Edison* line of earlier administrative decisions without explaining its reasons. Pet. at 9-12. Petitioner's argument rests on the fallacious premise that those cases are legally and factually apposite here. They are not.[8]

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[8]Even if Petitioner were correct, however, the appropriate result requires nothing more than a remand to the Board to provide an explanation for its decision here in light of the earlier rulings. An administrative agency's failure to explain a departure from or to explicitly distinguish seemingly controlling authority does not grant the reviewing court license to step in and determine the issues on the merits. Rather, the court should afford the agency the opportunity to tender its

A. The *McGraw Edison* Line Analyzed

The *McGraw Edison* cases generally concern persons denied union membership or whose full membership rights were suspended or terminated because they had engaged in protected § 7 activity. Here, the ALJ, the Board and the Court of Appeals found that Petitioner's conduct in directly dealing with the company to promote a plan that would have converted a significant number of bargaining unit jobs to salaried, nonunion positions fell outside the range of protected § 7 conduct.[9] Thus, the *McGraw Edison* cases simply are inapplicable, as the Court of Appeals noted. Pet. App. at 14a.

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rationale. This is well-settled law. *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 442-44 (1965); *Oil, Chemical & Atomic Workers Intern. v. NLRB*, 806 F.2d 269, 273-74 & n. 34 (D.C. Cir. 1986); *Intern. Ass'n of Bridge v. NLRB*, 792 F.2d 241, 248 (D.C. Cir. 1986).

[9]The ALJ found, *inter alia*, that Petitioner and his cohorts "were not disciplined for the exercise of any rights protected by Section 7 of the Act." Pet. App. at 53a. On review, the Board stated that "[W]e agree with the judge that the discipline was lawful." Pet App. at 26a. While the Board's decision is not as explicit on this point as it might have been, the tenor of the entire opinion supports this conclusion. The Court of Appeals so recognized. Pet. App. at 14a.

In each of those cases, the disciplined union member sought to stop paying any and all dues to the organization, at which point each of the unions attempted to invoke a union or agency shop agreement with the employer to cause the member's termination. These cases all pre-date this Court's decision in *Beck*, recognizing that Congress intended to preclude free riders and that all represented employees, whether full members or not, must make core financial contributions to the union. See, discussion, infra at 18-20. The detailed analysis in *Beck* makes clear that even a wrongfully disciplined union member cannot turn that discipline into an excuse for refusing to make core financial contributions to the union. In other words, improper union discipline does not vitiate the employee's duty to make core financial contributions to the organization, just as a non-member must. Here, of course, Petitioner was lawfully disciplined and wanted to quit paying all dues. The *McGraw Edison* cases, especially considered in light of *Beck*, provide no such refuge. The Court of Appeals so observed. Pet. App. at 12a.

In *Steelworkers Local 4186 (McGraw Edison Co.)*, 181 NLRB 992, 992 (1970), a union member was suspended from membership "for more than one year" because he filed a decertification petition with the Board. The member then refused to pay his dues, and the union sought his discharge from employment pursuant to a union-security clause in the labor agreement. The Board held that the

underlying suspension constituted an unfair labor practice and the union's effort to invoke the union-security provisions amounted to continued, unlawful coercion.[10]

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[10]The remaining five cases in the *McGraw Edison* line fall into a generally similar pattern: *Communications Workers Local 9509 (Pacific Tel. & Tel. Co.)*, 193 NLRB 83 (1971) (The Board finds the union committed an unfair labor practice by trying to enforce a union-security clause against a member who stopped paying dues after he had been expelled from the labor organization for circulating a decertification petition.); *Communications Workers Local 1104 (New York Tel. Co.)*, 211 NLRB 114 (1974), *enforced*, 520 F.2d 411 (2d. Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976) (The Board upholds an ALJ determination that the union committed unfair labor practices by attempting to enforce union-security clauses against persons who declined to pay dues after they had been denied membership because they either crossed a picket line during a strike or participated in the organizational activities of a rival union.); *Telephone Traffic Union (New York Tel. Co.)*, 241 NLRB 826 (1979) (The Board finds the union committed an unfair labor practice by threatening to enforce a union-security clause against a member who wanted to stop paying all dues after she had been suspended from the union for one year for participating in the organizational efforts of a rival union.); *Inland Boatman's Union of the Pacific (Dillingham Tug & Barge Co.)*, 276 NLRB 1261 (1985) (The Board upholds a finding that the union engaged in an unfair labor practice by seeking enforcement of a union-security clause against members who quit paying dues after they had been suspended from the organization for periods up to 19 years for

B. The *McGraw Edison* Line Is Inapplicable, Particularly In Light Of *Beck*

As noted previously, the *McGraw Edison* line of cases is irrelevant here, since the activities for which Petitioner was sanctioned enjoyed no § 7 protection. Accordingly, there could be no § 8(b)(1) violation, which, by definition, requires that a union "restrain or coerce" employees exercising "rights guaranteed in section 7 . . . ."

Moreover, the *McGraw Edison* cases are based on the notion that a union member may refuse to pay any and all dues as some sort of self-help remedy against union discipline he or she perceives as unfair or unlawful. Petitioner likewise suggests that a union member who has been disciplined may refuse to pay all dues, thus becoming a free rider. Plainly, this proposition cannot stand in the face of the detailed analysis in *Beck* demonstrating a clear congressional intent in enacting § 8(a)(3) both to eliminate

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supporting a rival union.); *Machinists District 94 (McDonnell Douglas)*, 283 NLRB 881 (1987) (The Board upholds a finding that the union committed an unfair labor practice by attempting to enforce a union security clause against members who lawfully resigned from the organization, ceased paying dues, and following their resignations crossed a picket line to continue working -- conduct for which the union then fined and otherwise sanctioned them.).

compulsory union membership as a condition of employment and to preclude free riders. *Beck*, 487 U.S. at 747-49.

While Congress wished to eliminate "the abuses associated with" closed-shop agreements, it was "equally concerned, however, that without such agreements, many employees would reap the benefits that unions negotiated on their behalf without in any way contributing financial support to those efforts." *Id.* at 748. Thus, "§ 8(a)(3) was designed to remedy the inequities posed by 'free riders' who would otherwise profit from the Taft-Hartley Act's abolition of the closed shop." *Id.* at 753-55. In short, the section's "legislative justification" lay in "ensuring that nonmembers who obtain the benefits of union representation can be made to pay for them . . . ." *Id.* at 759.[11]

This Court noted and, indeed, highlighted the congressional determination that "no employee" benefiting from collective bargaining efforts of a union should be absolved of the obligation to pay his or her fair share of the costs of those efforts. *Id.* at 750. The Court stated: "'Congress' decision to allow union-security agreements *at all* reflects its concern that . . . the

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[11]These "benefits" are the presumably enhanced terms and conditions of employment that flow from collective bargaining, rather than the accouterments of full union membership such as attending organization meetings or running for organization office.

parties to a collective bargaining agreement be allowed to provide that there be no employees who are getting the benefits of union representation without paying for them.'" *Id.*, quoting with emphasis added, *Oil Workers v. Mobil Oil Corp.*, 426 U.S. 407, 416 (1976). In this regard, the legislative history is unambiguous. As Senator Taft told his colleagues, "[W]hat we do, in effect, [in passing § 8(a)(3)] is to say that no one can get a free ride in such a shop. That meets one of the arguments for the union shop. The employee has to pay the union dues." *93 Cong. Rec. 3953* (cited in *Beck*, 487 U.S. at 748 n. 5).

These "financial core" dues, of course, are limited to an amount reflecting the costs of collective bargaining, grievance processing and other representational duties and cannot include any assessment for political activities or other functions. *Beck*, 487 U.S. at 745.

Through its careful analysis of the legislative history of § 8(a)(3), *Beck* demonstrates that an employee benefiting from a union's bargaining efforts must pay dues equivalent to his or her share of those costs. This is true whether the employee is a full member or a "financial core" member. It is also true whether the employee has suffered union discipline curtailing his or her full membership rights. Whatever the status of those full membership rights, the employee, as a constituent of the bargaining unit for which the union acts, shares in the

benefits conferred through those actions. And, as *Beck* makes clear, the employee must financially contribute to defraying the costs of that representation effort. *Id.* at 753 n. 8 ("[T]he costs of representation must be borne equally by all those who benefit[.]")[12]

In effect, *Beck* renders the *McGraw Edison* line of cases little more than a legal dead-letter. It is no coincidence that *Machinists District 94*, the last decision in that line, was issued about a year before this Court's opinion in *Beck* and almost nine years ago.[13]

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[12]This is further reflected in the requirement of § 8(a)(3) that dues be "uniform." Therefore, a union could not levy disproportionately high dues on non-members or dissident members and then seek termination of their employment pursuant to a union-security agreement if they refused to pay the discriminatory excess. *Beck*, 487 U.S. at 753 n. 8. It necessarily follows that a disgruntled union member cannot unilaterally quit paying his financial core dues -- thus according himself non-uniform and, in actuality, nonexistent dues -- while hoping to avoid discharge under an agency shop agreement.

[13]The *Beck* decision effectively wrought the legal equivalent of extinction for *McGraw Edison* and its descendants. The only issue that survived *Beck* appears to be whether a disciplined member who declines to resign from the union must continue to pay full dues or merely core financial dues. Certainly, *Beck* read in conjunction with *McGraw Edison* would seem to counsel that a member who has been suspended or expelled need only pay the latter. This

In sum, *Beck* teaches that a union member who believes his membership rights have been wrongfully suspended, extinguished or otherwise substantially impaired must continue to pay "core financial" dues. A member who refuses to do so -- like all of those in the *McGraw Edison* cases -- may face termination of his or her employment pursuant to an agency shop agreement. The termination would be proper, since it necessarily would arise from the member's deliberate and legally impermissible decision to cease paying all dues, rather than from the underlying grounds for which he or she was disciplined in the first place. That is, but for the member's refusal to pay any dues whatsoever, the union would have no basis to seek enforcement of an agency-shop agreement with the employer. The reasons the member has chosen to pay no dues are essentially irrelevant in light of the congressional intent, as carefully parsed in *Beck*, to eliminate free-ridership for anyone represented by a labor organization. In sum, union members may not unilaterally quit paying dues as a self-help remedy for real or

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case presents neither that question nor the related question of what dues a member must pay after his intra-union rights have been impaired, rather than terminated, as a disciplinary measure. Petitioner refused to any dues at all, pet. app. at 22a, and none of the parties raised this issue below, pet. app. at 26a n. 9. This Court typically refuses to entertain questions "not pressed or passed upon below." *Williams*, 504 U.S. at 41.

imagined transgressions of their labor organizations.

This is not to say, however, that a member who believes he has been wrongfully disciplined by the union to which he belongs is without recourse or remedy in challenging that discipline. For example, depending on the particular facts, the member may file unfair labor practice charges with the Board if he or she believes the union has interfered with any protected § 7 rights. He or she may seek relief pursuant to the Labor Management Report and Disclosure Act, 29 U.S.C. § 401 et seq., which, *inter alia*, protects against impairment of intra-union free speech rights and procedurally improper disciplinary actions. The member could bring suit alleging the union has breached its duty of fair representation, *see Vaca v. Sipes*, 386 U.S. 171, 177-180 (1967), or has violated the terms of its governing constitution, *see Wooddell v. Electrical Workers*, 502 U.S. 93, 98-103 (1991).

III. This Decision Creates No Inter-Circuit Split

Petitioner next contends certiorari should be granted because the Court of Appeals decision here conflicts with two earlier circuit rulings, *Communications Workers Local 1104*, 520 F.2d at 420; *NLRB v. Pipefitters Union Local No. 120*, 719 F.2d 178, 183-84 (6th Cir. 1983). As noted earlier, this is a wholly contrived conflict and, as such, affords no basis for review here.

In *Communications Workers Local 1104*, one case in the *McGraw Edison* line, the Second Circuit enforced a Board order essentially allowing a bargaining unit employee excluded from the union for supporting a rival organization to cease paying all dues without facing loss of employment pursuant to a valid union-security agreement. The court recognized its ruling would create a group of free riders consisting of "those who . . . are lawfully excluded from the union for activity that, though protected by § 7, is disloyal to the union." *Communications Workers Local 1104*, 520 F.2d at 420. The court presumed this result was a necessary by-product of the elimination of "compulsory unionism" or closed-shop agreements effectuated through the passage of § 8(a)(3). *Id.* In arriving at its conclusions, the court did not review the legislative history and, indeed, expressly noted an apparent "absen[ce of] explicit legislative instruction" on how to reconcile the correlative problems of eliminating closed shops and preventing free riders. *Id.*

Some 13 years later, this Court provided that guidance in *Beck* with its studied review and analysis of the congressional intent behind the adoption of § 8(a)(3). That analysis, of course, reveals a Congress firmly set against both forced union membership and free ridership by non-members. As *Beck* explains, those concerns are resolved by requiring all employees within a bargaining unit to pay core

financial dues to the labor organization but demanding full membership of none of them.

Had the Second Circuit the benefit of *Beck* when it considered *Communications Workers Local 1104*, the result necessarily would have been different. Thus, there is no genuine conflict between the Court of Appeals decision here and that of the Second Circuit, given an intervening and controlling opinion of this Court mandating an outcome consistent with that reached below in this case.[14]

In fact, the result in *Communications Workers Local 1104* demonstrates one of the principal harms that would occur if Petitioner's position here were accepted. Any union member subjected to intra-union discipline could cite that action as a reason for withholding payment of all dues, thereby, becoming a free rider. This would encourage members who want to avoid paying dues to engage in misconduct inviting union sanctions. Once disciplined for that misconduct, those members would be placed in a "better" position with respect to their dues obligations than either full members or

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[14]Even if *Communications Workers Local 1104* were a viable statement of the law post-*Beck*, its conclusion is distinguishable factually from that reached in this case. The Second Circuit would have bestowed free-rider status on those union members who had engaged in protected § 7 activity. *Communications Workers Local 1104*, 520 F.2d at 420. Here, Petitioner's conduct was not within the protections of § 7.

financial core members. Such a result typifies a scenario violating the legal axiom that a person should not benefit from his own wrongs. Likewise, it would seem to beg dissatisfied union members to claim any and all manner of union activity as improper discipline or other misfeasance so as to avoid their dues obligations.

Confronted with such a doctrine, a union likely would refrain from enforcing its *bona fide* internal rules in many instances. As the Court of Appeals suggested here, this would truly create a Hobson's choice in which the union must either forego discipline of members whose conduct was plainly destructive of the organization's collective bargaining position or impose discipline and, thereby, create a class of free riders. Pet. App. at 7a-8a. This outcome is inconsistent with the purposes behind § 8(a)(3). Moreover, it would effectively read out of the Act that portion of § 8(b)(1)(A) providing that a union shall not be impaired in prescribing and enforcing its internal membership rules. And it would insinuate the government far more deeply into matters of internal union operation than Congress ever intended. *See Scofield*, 394 U.S. at 428 (Congress did not intend to intrude upon "the internal affairs of unions" in passing the Taft-Hartley Act); *Wirtz v. Local 153, G.B.B.A.*, 389 U.S. 463, 471 (1968) (LMRDA consistent with "general congressional policy to allow unions great latitude in resolving their own internal controversies . . . .").

Petitioner's reliance on the Sixth Circuit decision in *Pipefitters Union Local No. 120* to create a circuit split is equally unavailing. In that case, the union promised membership to two employees upon completion of their probationary work periods. They completed their probation and were otherwise fully qualified for and apparently desirous of accepting union membership. The union, however, reneged on its promise of membership and, yet, attempted to make the pair pay full union dues to avoid termination of employment under a union-shop agreement. Thus, the union failed to make membership available to the individuals on the same terms and conditions applicable to others and attempted to coerce and deter them in their efforts to join the union. The factual scenario presented there bears little similarity to that here, since Petitioner had been afforded full union membership. Thus, the results are not in conflict either.

In making this argument, Petitioner also grossly misuses *Pattern Makers*, 473 U.S. 95, in an effort to bolster his claim that he should be entitled to free-rider status as part and parcel of Congress' aim of fostering "voluntary unionism." Pet. at 17-18. In *Pattern Makers*, this Court held that voluntary unionism would be thwarted if members could not freely resign from labor organizations and, in doing so, avoid internal discipline. *Id.* at 107 ("[T]he Board was justified in concluding that by restricting the right of employees to resign, [the union's rule] impairs the policy of

voluntary unionism."). Here, of course, Petitioner could have resigned and avoided the union sanctions. But he chose not to and instead sought to stop paying dues -- something he certainly could not have done as a resignee, since he would have been obligated to make a core financial contribution. The *Pattern Makers* decision in no way endorses a self-help refusal to pay all dues as a component of "voluntary unionism" or on any other grounds.

IV. The Board Correctly Found Gilbert Exercised No Protected § 7 Rights, and The Issue Fails to Present An Important Question

The Board recognized that Petitioner's conduct as Local D-100 president in pursuing a company proposal aimed at eviscerating the union's bargaining unit at the plant was not protected under § 7. This is precisely the sort of statutory interpretation entrusted to the agency's expertise in "applying the general provisions of the Act to the complexities of industrial life." *NLRB v. Erie Resistor Co.*, 373 U.S. 221, 236 (1963). In *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 829-30 (1984), this Court expressly noted that the Board's interpretation of what conduct falls within § 7 must be accorded deference and upheld if reasonable.

There is little question that cutting the size of the bargaining unit in half would have had an extraordinarily adverse impact on the union's ability to operate as an effective representative of its remaining

members. Pet. App. at 52a. Such collective representation of workers for improved wages, hours and other working conditions rests at the very heart of this country's "national labor policy." *Allis-Chalmers Mfg.*, 388 U.S. at 180. This Court has held that a union must be allowed "to protect against erosion [of] its status under that policy through reasonable discipline of members who violate rules and regulations governing membership." *Id.* at 181. Accordingly, a union can lawfully discipline strikebreakers. *Id. See also Sheet Metal Workers Local 22 (Miller Sheet Metal)*, 296 NLRB 1146 (1989) (Local acts lawfully in disciplining member for dual unionism); *Meat Cutters (S & M Grocers)*, 237 NLRB 1159 (1978) (union threat to discipline members who fail to support organizing drive does not violate § 8(b)(1)). Petitioner's conduct here, which would have led to the decimation of the bargaining unit, is at least as destructive as crossing a picket line. Thus, even if his actions fell within the scope of § 7, Petitioner properly could have been subjected to internal union discipline, since that discipline would not impair "overriding" labor policies but, rather, would further their objectives. *See Scofield*, 394 U.S. at 429. Moreover, Petitioner could have resigned his membership and avoided any internal discipline whatsoever. He did not.

None of the authority Petitioner cites so much as hints his conduct falls within § 7 or should be protected. *See Helton v. NLRB*, 656 F.2d 883 (D.C. Cir. 1981) (union

member illegally coerced for posting literature from intra-union watchdog group on union bulletin board); *Hendricks Cty. Rural Elec., Etc. v. NLRB*, 603 F.2d 25, 27 (7th Cir. 1979) (employer acts illegally if it disciplines employee for circulating petition seeking reinstatement of fired co-worker); *Laborers Local 806*, 295 NLRB 941, 944 (1989) (Local improperly coerced members who, *inter alia*, filed Board charges alleging discriminatory job referral system); *Roadway Express, Inc.*, 108 NLRB 874 (1954), *enforced sub nom. Teamsters Local 823 v. NLRB*, 227 F.2d 439 (10th Cir. 1955) (Local unlawfully threatened members after they made written complaint to International).

Ultimately, whether Petitioner's conduct was protected has no bearing on the outcome below. Even if it were protected, the reason the union sought to invoke the union-security clause was Petitioner's refusal to pay any dues whatsoever. As discussed, Petitioner's improper self-help precipitated resort to the union-security clause. Petitioner had no legal right to stop paying all dues regardless of the propriety of the discipline. Accordingly, a decision in Petitioner's favor on the merits of this question would not change the ultimate determination below. This Court should be reticent to grant certiorari on a question so narrow and remote that it will not even affect the legal rights of the parties to the case.

Finally, determining whether specific conduct is protected often turns on the particular factual circumstances. *See, e.g., Reef Industries, Inc. v. NLRB*, 952 F.2d 830, 837 (5th Cir. 1991); *Roadmaster Corp. v. NLRB*, 874 F.2d 448, 452 (7th Cir. 1989). The issue tends to be inextricably fact-bound, and any determination of this Court would be similarly limited to this case alone. Absent some gross confusion or split among the circuit courts in dealing with the type of factual situation presented here (and there appears to be none), this Court should decline review on certiorari.

V. Conclusion

For the reasons stated here, the petition for writ of certiorari should be denied in its entirety.

Respectfully submitted,

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